the auction-purchaser. If he was a representative he was the representative of the judgment debtor who was the plaintiff, and the new suit was not between the parties to the suit in which the attachment was ordered or their representatives. Further than this, the attached property was never vested in the purchaser in accordance with the requirements of the Civil Procedure Code and was incapable of assignment. Accordingly, in the opinion of the majority of the Court (myself and Whitley, J.) the assignee was not a representative at all. It is unnecessary to review the various Indian authorities cited by the respondent with a view to showing that the Privy Council decision had not always been followed in the different High Courts of India. I considered all these authorities in my judgment in N.S. Civil Appeal 5 of 1935. They are inconsistent and of little assistance. I express no opinion as to whether, notwithstanding the provisions of section 272, a separate suit (if taken in the Court which issued the execution) may sometimes be treated as an application in the proceedings in which execution was issued. This practice, which was frequently followed in the Indian Courts, has now received legislative sanction by an amendment of the corresponding provision of the Indian Civil Procedure Code. No authority, however, has been cited in support of the proposition that a suit may be treated as an application when it has been brought in quite a different Court as it was in the present case. I respectfully agree with the observations of Lord Macnaghten in *Prosunno's case* at p. 169, where he says: "It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and speedily as possible". The costs of an application in the Port Dickson suit would have been trifling. By bringing a separate suit in the High Court the costs have been enormously increased, and the appellant has been ordered to pay $1,700 in costs in a case where the purchase price was under $300. It appears to me that the procedure laid down by section 272 is a very salutary procedure, and the provisions being peremptory, should be followed for the reasons laid down by Jessel M.R. in *Taylor v. Taylor,*[12].

I would, therefore, allow the appeal and set aside the order in the Court below with costs and in the Court of Appeal. The deposit should be paid to the appellant or his solicitors.

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]

GORDON-SMITH, J.

April 23, 1940.

R. K. RAMALINGAM NAYKAVADIAR & N. THARMALINGAM THAVER

vs.

K. T. GANAPATHY PILLAY, R. D. RAMASAMY PILLAY & M. K. RAMACHANDRAM NAIDU.

[SELANGOR CIVIL SUIT No. 113 of 1938]

Civil Procedure Code (Cap. 7) sections 5 and 597—Matter directly and substantially in issue in previously instituted suit—Stay of proceedings—Inherent jurisdiction of Court.

In Civil Suit No. 58 of 1929 a compendious order was made regarding the administration and management of a Hindu Temple. The order comprised a scheme of management of the Temple, which itself contained provisions for variation or amendment of the scheme, and by one of the orders all proceedings in the suit were stayed, except in regard to certain administrative steps, with liberty to apply granted to certain persons, namely:

(a) the parties to the suit;
(b) the members of the Board of Management and Executive Committee of the Temple; and
(c) the trustees and other officers mentioned in the scheme.

The right to apply was limited, in that the leave of a Judge in Chambers had first of all to be obtained ex parte to make such application and the Judge had to be satisfied that there was reasonable and good cause therefor.

Both plaintiffs in the present suit were members of the Board of Management of the Temple and sued on behalf of members, subscribers, worshippers and beneficiaries of the Temple. The defendants were sued as Trustees of the Temple and as the proper officers in whose name the Temple should be sued. The 1st plaintiff and the 1st and 2nd defendants were also parties to the earlier suit, and the reliefs sought were directly and substantially the same in both suits.

The defendants claimed that the present suit was in contravention of the order for stay of proceedings in the earlier suit: alternatively that even if the present suit were permissible the Court had a discretion to stay it.

Held, that as the parties and reliefs sought in the two suits were substantially the same and the former suit was still pending, section 5 of the Civil Procedure Code precluded the Court from proceeding with the trial of the present suit.

Held further, that the Court has a general jurisdiction to stay proceedings in a proper case under section 597 of the Civil Procedure Code. The scheme of management itself contained provisions so that it could be amended without recourse to the Court. The past litigation could be re-opened in the old suit, but only subject to the safeguard of obtaining the leave of the Court on showing substantial cause. The proper procedure therefore was to apply in the former suit, and the discretion of the Court should be exercised to stay the present suit.

Cases referred to:—

(1) *Townshend v. Townshend* 23 Ch. D. 100.

(2) *Wood v. Connolly Bros. Ltd.* (1911) 1 Ch. D. 731.

F. A. Briggs for plaintiffs.

J. T. Tosswill for 1st and 3rd defendants.

Gordon-Smith, J.—This was an issue raised by paragraph 23 of the defence which, under the Court Rules of 1932, Rule 1, subrule 31 *(vide* Vol. I of the Rules under Enactments at page 196) and by consent of the parties, had been set down as a preliminary issue to be decided before the hearing of the suit.

Paragraph 23 of the defence reads as follows:

> "This defendant admits that some modification of the terms of the present scheme is necessary for the proper administration of the Temple and its affairs but states that the plaintiffs are not the proper persons to apply for such modification. This defendant will submit that under the order made in Civil Suit No. 58 of 1929 a copy of which is attached to the statement of plaint, by which order proceedings in the said suit were stayed, liberty to apply, subject to leave of a Judge in Chambers being obtained, was given to all parties to such suit and to all members of the Board of Management and the Executive Committee and Trustees and other Officers of the Temple and that this suit is brought in contravention of the terms of such order and is unnecessary by reason of the provisions thereof, the 1st plaintiff being a party to Civil Suit No. 58 of 1929 and the 2nd plaintiff alleging himself to be a member of the Board of Management of the said Temple."

It is unnecessary to go into the details of the claim in Civil Suit 58/1929 as eventually a complete settlement was arrived at which was incorporated in the consent order of the 28th November, 1930, a copy of which was attached to the plaint in the present suit. It is sufficient to state that that suit was brought with a view to settling disputes which had arisen over a Hindu Temple and for evolving a scheme for its future management, status and control. It was instituted with the consent of the Legal Adviser as provided by section 18 of the Government Suits Enactment (Cap. 17) and the Legal Adviser has also given his consent to the institution of the present suit, as evidenced by his letter of the 13th July, 1939, attached to the plaint.

It is, however, necessary to consider in some detail the order set out above. The first part of the order contains nine declarations dealing severally with—

(1) the three Temples,
(2) & (3) who are entitled to certain titles and honours,
(4) vesting of the property and funds in trustees,
(5) management and control of the same,
(6), (7) & (8) accounting by certain persons in respect of certain specified properties, and
(9) the appointment of a Board of Management.

Then follow various orders, which I will refer to *seriatim* and by alphabetical letters.

Order A is to the effect that the trust should be managed in accordance with the scheme annexed to the order and which scheme the Court approved.

Order B provides for publication of notices calling a meeting for the purpose of constituting and appointing a Board of Management and for the subsequent filing of an affidavit in regard to such having been done.

Order C provides for the calling of a meeting of such Board of Management and for the appointment thereby of an Executive Committee and for the subsequent filing of an affidavit that such has been done.

Order D provides for confirmation of such appointments when such affidavits have been filed.

Order E appoints the trustees, namely the 1st plaintiff and the 1st, 4th, 5th and 6th defendants, subject to a proviso.

Order F is a vesting order of the properties in the trustees.

Order G provides for the adoption and settlement by the Board of Management of the accounts to be furnished in accordance with the Declarations 6, 7 and 8, previously referred to.

Order H provides for accounts and enquiries to be taken by the Registrar in the event of a failure to adopt or settle the accounts referred to in *Order G.*

Order J provides for payment by the 1st, 2nd, 4th and 5th defendants of the sums certified to be due by them.

Order K is already previously set out, *verbatim.*

Orders L, M, N, O deal with costs but I would mention that counsel stated that the $9,000 specified in *Order L* was "a mere fragment" of the costs incurred in the course of the dispute and litigation.

Attached to the order is the scheme for the conduct and Management of the Temple (or trust or charity). I do not propose to set this out as it appears to be a complete scheme, which has already received the approval of the Court and no doubt was the subject of prolonged discussion and consideration. I would merely emphasize that in the scheme itself *(vide* paragraph 22), there is provision for variation or amendment of the scheme with the safeguards that

the objects of the charity shall not be frustrated and secondly, that 2/3rd of the members of the Board of Management shall consent thereto.

I now come to a consideration of *Order K.*

All proceedings in the suit were stayed except in regard to the administrative steps earlier referred to, but there was liberty to apply granted to certain persons. These persons were:

(a) the parties to the suit,
(b) the members of the Board of Management and Executive Committee,
(c) the trustees and other officers mentioned in the scheme.

The reasons for any such application had to be generally for the purpose of giving effect to, or for carrying into effect, the provisions of the order, or as I interpret it, including the carrying into effect or giving effect to the scheme approved by the Order.

This right, however, is limited or, in effect safeguarded, in that the leave of a Judge in Chambers had first of all to be obtained, *ex parte,* to make such application, and the Judge had to be satisfied that there was reasonable and good cause therefor.

The reasons for including provisions of this nature and upon a settlement of disputes of such a nature are obvious, and it was a consent order.

One knows only too well how prone members of this section of the community are to rush to Court upon the slightest pretext, imagined grievance or slight, and involve themselves and others in expensive and protracted litigation. This suit had already cost the parties, and the Temple itself, thousands of dollars and at last, and after prolonged discussions and argument, a settlement was arrived at and provision made for the constitution and establishment of the Temple upon a proper basis with an agreed scheme of management both for the present and future, all of which had been examined and considered and approved by the Court.

The above gives a very brief and short account of the past history of the earlier litigation and I will now pass on, also very briefly, to the plaint in the present suit.

The 1st plaintiff in the present suit was the 10th defendant in the earlier suit. The 2nd plaintiff was not a party thereto but both are alleged in the present plaint to be members, subscribers, worshippers and Ubayakarars of the temple and that both are members of the Board of Management and sue on behalf of the members, subscribers, worshippers and beneficiaries of the Temple.

The 1st and 2nd defendants were respectively the 4th and 5th defendants in the old suit but the 3rd defendant was not a party thereto. The 2nd defendant has not entered an appearance to the suit. All three defendants are sued personally and as trustees of the Temple and as the proper officers in whose names the Temple shoud be sued.

The first 16 paragraphs of the plaint are, mostly, informative.

Paragraph 17 puts forward contentions as to the liabilities of the Board of Management.

Paragraph 18 contains 12 charges of breaches of trust and duty on the part of the board (including the defendants).

Paragraph 19 similarly contains 8 such charges against the 3rd defendant.

Paragraph 20 similarly contains 3 charges against the 1st and 2nd defendants.

Paragraphs 21, 22 and 24 contain further allegations and paragraph 23 alleges that the scheme is unworkable and that the plaintiffs will submit proposals for its amendment.

The first prayer asks for a declaration that the plaintiffs are members of the Board of Management, and the second prayer for the removal of the defendants as trustees. Various other reliefs are asked for, including appointment of new trustees, amendment of the scheme, appointment of a receiver and accounts by the trustees on the footing of wilful default.

I need not refer to the defences filed by the 1st and 3rd defendants as I have already set out paragraph 23, *verbatim,* which is the only one with which the Court is concerned at the moment. This defence specifically raises the issue that the present suit is brought in contravention of *Order K* of the old suit and in argument before me it was also submitted that even if such institution was permissible the Court had a discretion to stay the present proceedings and should exercise such discretion in favour of so doing.

On the first point the relevant portions of section 5 of the Civil Procedure Code (Cap. 7) read as follows:

> "5. Except....no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit for the same relief between the same

parties, or between parties under whom they or any of them claim, pending in the same or any other Court...."

What was the relief sought by the Suit 58/1929, or the old suit, as I will call it?

It prayed for the appointment of trustees, the passing of accounts by the 1st defendant therein (who was alleged to be Vice-President of the Temple), the vesting of property in the trustees, approval of a scheme of management and the appointment of an Interim Receiver and, as stated in paragraph 7 of the plaint in the present suit, in exhibiting the order thereon this Honourable Court "declared the nature and objects of the Temple and provided by means of a scheme annexed to the said order for the conduct and management of the Temple." If one refers back to the prayers of the present suit that I have enumerated, one sees immediately that the reliefs sought are directly and subtantially the same in both suits. It was also emphasized, in argument before me by counsel for the plaintiffs that the plaintiffs' object in bringing the suit was that the scheme previously evolved and approved by the Court should be torn to pieces and reset and that the gist of the present action was amendment of the scheme. It is true that the parties are not precisely the same but the two plaintiffs in the old suit were subcribers to the temple and the suit was brought by them as such and for the benefit of themselves and others against ten defendants claiming to represent other interests in the Temple, either as constructive trustees, managers or otherwise. In the present suit the two plaintiffs claim interest in the Temple not only as subscribers but as members of the Board of Management and sue the 1st and 2nd defendants personally and as trustees and as against the 3rd defendant as having acted as managing trustee of the Temple. It will be seen, therefore, that not only are the parties substantially the same, but also the reliefs asked for are substantially the same and the old suit is still pending, as it has not finally been disposed of and further interlocutory proceedings can be taken thereunder.

It seems to me, therefore, that section 5 of the Civil Procedure Code precludes the Court from proceeding with the trial of the present suit and I hold accordingly. I may, however, be wrong as to this and it is desirable therefore to consider what other powers exist in the Court to stay the present suit.

By section 597 of the Civil Procedure Code, the inherent jurisdiction of the Court is not limited by the Code and such is presumed. The Court, therefore, has a general jurisdiction to stay proceedings in a proper case.

In *Townsend v. Townsend*[1] a judgment creditor had obtained in the Lancaster Palatinate Court a declaration as to a charge on lands comprised in a settlement and an order for administration, inquiries and a receiver. Shortly afterwards, a beneficiary under the settlement obtained a somewhat similar order in the High Court and on application to the High Court by the judgment creditor, such proceedings in the High Court were stayed. Jessel, M.R., said "It is perfectly clear that it is not right for these two administration actions to go on together", although some relief was claimed in the High Court suit that had not been claimed in the other suit. In another case, *Wood v. Connolly Bros., Ltd.*[2], the High Court restrained concurrent and similar proceedings in the Palatinate Court, but this was mainly on the grounds that these other proceedings were vexatious and oppressive.

In argument before me for the plaintiffs it was submitted that the inherent jurisdiction of the Court to stay the present suit should not be exercised, because such suit was neither vexatious, oppressive nor an abuse of process. Further, that the Court should not shut out beneficiaries not parties to the previous suit and that they had to bring a separate action.

It is not on those grounds in themselves that the stay is asked for nor has it been pleaded that the present suit is vexatious or oppressive but it is pleaded that it is unnecessary and brought in contravention of the order of the old suit and under which order the plaintiffs can obtain all the relief that they seek in the present suit. In my view the old suit is still pending and the question I have to ask myself is, is it right that these two suits should go on together? I have no hesitation in answering it in the negative but will give my reasons why the Court should exercise its discretion under its inherent jurisdiction and stay the proceedings in the present suit.

I have already given the reasons for the institution of the old suit and given a brief account thereof and the results. The order made therein was a consent order by all concerned. No doubt there was a pious hope that the scheme would put a stop to the endless bickerings and contentions amongst the adherents of this sect in regard to their Temples. What was thought at the time to be a feasible scheme was approved and adopted and the litigation, which as I have said was prolonged and extremely costly, stayed so far as was thought to be necessary. There was, and is, a proviso so that if it was subsequently found that recourse to the Court was again necessary, then

such could be had by any of the parties to the suit or any of the more responsible persons connected with the Temple, that is to say, the trustees, the Board of Management and the Executive Committee. All of these persons have liberty to apply in the old suit "generally for the purpose of giving effect to, or for carrying into effect the provisions of this order". If it is necessary to amend the scheme, such can be done without recourse to the Court, as provision is included in the scheme for its own amendment, and under proper safeguards.

There is a further safeguard in the order itself in that before this past litigation can be re-opened, leave has to be obtained *ex parte* and there is the still further safeguard against any such application being made without substantial cause in that upon such *ex parte* application such leave may be given upon terms as to costs or security for costs. Herein, in my opinion, lies the main reason why this present suit has been instituted instead of application being made in the old suit.

It was also urged strongly in argument before me that because the Legal Adviser has given his consent to this present suit being instituted, therefore, *ipso facto,* it is a proper suit and one which this Court should entertain. With the greatest respect, I can see no substance in this argument. It may very well be that the existing state of the affairs of the Temple justify bringing them before the Court and the Legal Adviser may have been of that opinion, but how those matters are to be brought before the Court is no concern of his.

In my opinion the proper procedure was to make application to the Court as provided for in the old suit and not only is this present suit precluded by section 5 of the Civil Procedure Code, but also there is a discretion in the Court which, under its inherent jurisdiction, should be exercised to stay the present suit, as it is in the nature of a concurrent suit, by the same parties in their representative capacities, and asking for substantially the same relief as was asked for in the old suit.

There will, therefore, be an order accordingly, with costs against the plaintiffs.

Suit stayed.

[ORIGINAL CIVIL JURISDICTION]

GORDON-SMITH, J.

April 4, 1940.

BEDAH BINTI HAJI OSMAN as legal personal representative of GADANG BIN MAULANA

(Plaintiff)

vs.

IBRAHIM BIN HAJI MOHAMED SALLEH

(Defendant).

[SELANGOR CIVIL SUIT No. 79 of 1938]

Land Enactment 1911 S. 37 (1)—Land Code (F.M.S.) S. 42—Registration as proprietor gives indefeasible title except in case of actual fraud—remedy of person dissatisfied with decision of Collector of Land Revenue.

In 1920 the defendant made an application under S. 37 (1) of the Land Enactment 1911 to the Collector of Land Revenue to have his name substituted in the register for that of the plaintiff. Due notice of the application was gazetted and published and posted on the land itself. Evidence was recorded from which it appeared that the defendant was in possession of the land and was entitled to such possession. The defendant stated that the plaintiff's whereabouts was unknown. The Collector of Land Revenue made an order accordingly and the transfers to the name of the defendant were duly made and his name entered as the registered proprietor of the lands. The plaintiff brought a claim for a declaration of ownership of the land in question in him and that the defendant execute a memorandum of transfer of the same to him.

Held, (1) That the defendant has, as the registered proprietor, an indefeasible title to the land except where there is a specific allegation of fraud, and the facts here alleged do not amount to actual fraud.

Held, (2) That a party dissatisfied with the decision of the Collector must take the remedy of appeal given to him by the Land Code and if he does not do so he must be taken to have acquiesced therein.

Subramanian v. Muthiah Chetty(2) applied.

Cases referred to:—

(1) *Ong Tin v. Seremban Motor Garage,* 1 F.M.S.L.R. 308.

(2) *Subramaniam v. Muthiah Chetty,* 3 M.L.J. 222; (1933-4) F.M.S.L.R. 270.

R. H. Legge for Plaintiff.
Tengku Ismail for Defendant.

Gordon-Smith, J.—Paragraph 7 of the Defence alleges that the Plaintiff's claim is not maintainable in law and this point was, by agreement, taken as a preliminary issue.

The Defendant is the registered proprietor of lots 1435 and 576 in the Ulu Langat Mukim as appears by Certified Extracts from the Mukim Register Nos: 5086 and 5087.